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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

PETE WILSON, et al.,

Defendants.

No. C-94-2307-CW

REPLY TO DEFENDANT'S
OPPOSITION TO MOTIONS TO AMEND
THE COMPLAINT AND MODIFY THE
CLASS

Date: January 8, 1999

Time: 10:00 a.m.

Court: Hon. Claudia Wilken

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ARGUMENT

I. THE COURT SHOULD GRANT PLAINTIFFS LEAVE TO FILE THE SECOND AMENDED COMPLAINT

Plaintiffs have sought leave of the Court to file a Second Amended Complaint. Among other things,^{1/} the new complaint adds developmentally disabled prisoners as plaintiffs, changes the class definition to include prisoners and parolees with developmental disabilities and adds a due process cause of action. Defendant Nielsen does not dispute the legal standards governing this motion, but argues that the motion should be denied because there has been an excessive delay in making this motion and that he will be prejudiced. Because neither argument has any merit, the Court should grant the motion.

1. Defendant Does Not Show Prejudice from the Amended Complaint

Defendant alleges generally that he will be unduly prejudiced if the Court grants plaintiffs leave to file the amended complaint. Defendant's argument fails first because he has not met his burden of proving undue prejudice. Defendant must make specific allegations of prejudice which are sufficient for the Court to assess its scope and potential impact. Defendant's vague and general allegations of prejudice are not sufficient. A-C Reorganization Trust v. DuPont De Nemours & Co, 968 F.Supp. 423, 432 (E.D. Wis. 1997).

Next, defendant contends that he will be prejudiced because he must now respond to another theory of liability. Again

1. Defendant does not complain about the substitution of new class representatives or of defendants who are successors in office.

1 defendant does not explain how adding a due process claim to the
2 case will cause him any specific prejudice. "[A] change in
3 theory . . . [is] not sufficient to justify denial of leave to
4 amend under the principles of Foman [v. Davis], 371 U.S. 178, 182
5 (1962)] and Davis [v. Piper Aircraft Corp.], 615 F.2d 606, 613
6 (4th Cir. 1980)]. A change in the theory of recovery may
7 obviously sometimes cause substantial prejudice to a defendant,
8 justifying denial of a motion to amend to assert that theory.
9 But the fact that an amendment changes the plaintiff's theory of
10 the case will not suffice as a reason for denial absent a showing
11 of prejudice, bad faith, futility or dilatoriness associated with
12 the motion." Ward Electronics Service, Inc. v. First Commercial
13 Bank, 819 F.2d 496, 497 (4th Cir. 1987); see also, Seifert v.
14 Solem, 387 F.2d 925, 929 (7th Cir. 1967) (complaint amended to
15 include claim for punitive damages on first day of trial).

16 In the present case, the additional cause of action will not
17 significantly alter the litigation. The two existing causes of
18 action under the disability statutes remain, and many of the same
19 facts relevant to proving discrimination against the disabled at
20 parole hearings also will show that the proceedings were not
21 consistent with the Due Process Clause. For example, plaintiffs
22 intend to prove counsel was not appointed to represent mentally
23 retarded parolees at revocation hearings. The failure to provide
24 assistance to these parolees is both unlawful discrimination
25 under the ADA and a violation of due process. See Gagnon v.
26 Scarpelli, 411 U.S. 778 (1973) (due process requires that counsel
27 be appointed in certain circumstances). Thus, the only burden on
28 defendant from this amendment will be to analyze the same facts

1 under a different theory. This small burden is insufficient to
2 defeat a motion to amend the complaint. Marcera v. Chinlund, 91
3 F.R.D. 579, 581 (W.D. NY 1982).

4 Defendant also argues that he will be prejudiced by a
5 modification of the plaintiff class. Modification of the class,
6 by itself, does not establish sufficient prejudice to deny a
7 motion to amend the complaint. Cf. Bertrand v. Sava, 535 F.Supp.
8 1020, 1023 (S.D. N.Y. 1982) rev'd on other grounds 684 F.2d 204
9 (2d Cir. 1982) (transforming individual action into class action
10 is not by itself prejudicial). The class of prisoners and
11 parolees with mental retardation will not "interject entirely
12 disparate issues into and tend to obfuscate" the existing case.
13 Ibid. Discrimination against the mentally retarded is but one
14 more example of the application of the same policies and
15 procedures employed by the BPT. Moreover, the form of
16 discrimination experienced by mentally retarded prisoners is
17 closely related to that experienced by prisoners and parolees
18 with learning disabilities, who are current members of the
19 plaintiff class. See Declaration of Nancy Cowardin, Ph.D., dated
20 December 3, 1998, at ¶ 9.

21 Finally, defendant complains about perceived delays in
22 discovery. Any delay by plaintiffs in fully responding to
23 defendant's contention interrogatories occurred with at least the
24 tacit consent of defendant.^{2/} In response to plaintiff's

25
26 2. On August 10, 1998 plaintiffs responded to the
27 interrogatories by objecting on the basis that they were
28 premature since the case had only recently become active.
Plaintiffs reserved the right to supplement these
interrogatories in the future when they developed further
information. Pursuant to an informal agreement between the

1 objection that the interrogatories were premature, defendant did
2 not move to compel further responses to his interrogatories, and,
3 in fact, agreed to receive additional responses before December
4 25, 1998. Declaration of Donald Specter at ¶ 3. These
5 supplemental responses contain information about all of the
6 plaintiffs named in the proposed amended complaint. Id. at
7 Exhibit A.

8 Defendant's failure to attempt to compel discovery and his
9 acquiescence in not receiving further information until the
10 present undermines his claim that he has been prejudiced in the
11 past and that he will be prejudiced in the future.

12 2. The Amendments are Offered in Good Faith

13 Defendant argues that the motion is not made in good faith
14 because plaintiffs' counsel should know that defendant is not
15 violating plaintiffs' rights. First, that is obviously not the
16 correct standard. See Motion to Amend at 6. Second, plaintiffs
17 dispute defendant's assertion and have alleged facts to the
18 contrary in their complaint. See Second Amended Complaint at ¶¶
19 1, 18-19, 42. If the motion is granted the Court will determine
20 who is right after a trial. The merits are not at issue at this
21 stage of the process.

22 3. There Has Not Been Undue Delay in Bringing this Motion

23 Defendant complains that plaintiffs waited too long to bring
24 this motion. "This argument lacks merit because prejudice to the
25 opposing party, not the diligence of the moving party, is the

26 _____
27 parties on December 23, 1998 plaintiffs subsequently served
28 on defendant a supplemental response containing more
detailed information. Declaration of Donald Specter at ¶¶
2-3 , filed herewith.

1 crucial factor in determining whether or not to grant leave to
2 amend." Smith v. Costa Lines, Inc., 97 F.R.D. 451, 453 (N.D.
3 Cal. 1983). As noted above, defendant has failed to establish
4 such prejudice.

5 Defendant also takes issue with the fact that plaintiffs
6 waited until after the trial date was continued to bring this
7 motion. Plaintiffs waited until the trial date had been
8 continued, in part, because defendant would have been able to
9 make a stronger case for prejudice if plaintiffs moved to amend
10 so close to trial. Plaintiffs waited to file their motion until
11 they were assured that there would be sufficient time for
12 defendant to conduct discovery. Such minimal delay that had the
13 effect of protecting defendant's rights does not militate in
14 favor of denying the motion.

15 4. The Proposed Amendments are Not Futile

16 Defendant concedes that the new due process claim set forth
17 in the proposed complaint is arguable. Defs. Opp. at 8. Since
18 defendant does not dispute that a claim is futile only if it is
19 completely ineffective and would "beyond doubt" be dismissed for
20 failure to state a claim (see Pltfs. Motion to Amend at 7),
21 defendant's concession defeats his argument on this point.

22 **II. THE COURT SHOULD MODIFY THE CLASS TO INCLUDE PRISONERS AND**
23 **PAROLEES WHO ARE DEVELOPMENTALLY DISABLED**

24 Defendant James Nielsen's opposition fails to provide a
25 valid basis to challenge plaintiffs' motion to modify the class
26 to include developmentally disabled prisoners and parolees.
27 Contrary to defendant's assertions, the requested modification
28 would not interfere with Clark v. State of California, C96-1486

1 (N.D. Cal.), as the two cases *involve different defendants*.
2 Plaintiffs also have provided sufficient allegations and evidence
3 to support a finding that the Rule 23 class certification
4 requirements continue to be met after the modification.

5 1. The Proposed Modification of the Class Would Not
6 Interfere With the Clark Case.

7 Defendant mistakenly asserts that the modification of the
8 class would cause this case to interfere with the Clark case. In
9 fact, there is no interference because while both cases would
10 include developmentally disabled prisoners, the defendants differ
11 in each case. The only defendant going to trial in this action
12 is James Nielsen, as chairman of the Board of Prison Terms
13 ("BPT"). Neither Mr. Nielsen nor the BPT is a defendant in the
14 Clark case. The California Department of Corrections ("CDC"),
15 originally named in this action, has already reached a settlement
16 with plaintiffs in both this action and in Clark and is
17 unaffected by the proposed modification. The remediation plan
18 being developed in Clark does not address BPT behavior and the
19 remaining unlitigated claims in this action do not involve the
20 CDC.

21 The fact that many individuals would be part of both classes
22 is meaningless. There is no limit to the number of classes to
23 which an individual can be a member, whether against different
24 defendants or even the same defendant when there are different
25 claims. For example, one could be a class member of separate
26 securities and product defect actions against the same defendant.

27 Defendant's argument about potential conflicts with other
28 class actions would not have merit even if there was some overlap

1 with the Clark case. The class certified in Coleman v. Wilson,
2 No. CIV S-90-0520 LKK-JFM (E.D. Cal.), included inmates with
3 serious mental disorders who were housed at Pelican Bay. The
4 Madrid v. Gomez, No. C90-3094-THE (N.D. Cal.), class included all
5 inmates at Pelican Bay and focused on adequacy of medical care
6 and conditions of confinement. The courts had no difficulty
7 taking both cases through trial, despite the existence of
8 overlapping classes.

9 This Court rejected this same argument regarding supposed
10 class conflicts made in plaintiffs' original motion for class
11 certification. See Defendants' Brief in Opposition to Motion for
12 Class Certification, 10/7/94, pp. 16-17; Order dated 1/13/95. It
13 should do so again.^{3/}

14 2. Plaintiffs Have Provided the Court With a Sufficient
15 Basis to Find That the Rule 23 Requirements Are Still
Met After the Modification.

16 Defendant also asserts that plaintiffs' motion to modify the
17 class should be denied due to lack of evidence "of other
18 potential class members or of any pattern of systemic
19 discrimination." Plaintiff's Motion at p. 2. Defendant provides
20 no case support for this assertion. In fact, plaintiffs have
21 provided more than the required evidentiary showing as to whether
22 the Rule 23 class certification requirements will continue to be
23 met after the proposed modification.

24 First, the Court must accept the allegations of the
25

26
27 3. In order to remove any remaining concerns that this
28 class modification would interfere with Clark, the court's
order regarding plaintiffs' motions could even reiterate
that the modification only pertains to claims against Mr.
Nielsen and the BPT.

1 complaint as true for purposes of ruling on class certification.
2 In Re Intelcom Group, Inc. Securities Litigation, 169 F.R.D. 142
3 (D. Col. 1996). Second, only a minimal amount of additional
4 evidence is required:

5 [A class certification] determination does not permit
6 or require a preliminary inquiry into the merits
7 [citation]; thus the district judge is necessarily
8 bound to some degree of speculation by the uncertain
9 state of the record on which he must rule. An
10 extensive evidentiary showing . . . is not required.
11 So long as he has sufficient material before him to
12 determine the nature of the allegations, and rule on
13 compliance with the Rule's requirements, and he bases
14 his ruling on that material, his approach cannot be
15 faulted because plaintiffs' proof may fail at trial.

16 Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975).

17 Plaintiffs have asserted in detail in the proposed second
18 amended complaint how the two named individuals as well as the
19 sub-class of current and future developmentally disabled
20 prisoners and parolees have suffered discrimination by defendant
21 related to their BPT hearings. Proposed Second Amended Complaint,
22 ¶¶ 18-19, 27-28, 36, 42-43. These assertions are further
23 supported by the declaration of Dr. Nancy Cowardin, who explains
24 at length how the developmentally disabled and learning disabled
25 have comparable disabilities, face comparable discrimination by
26 the BPT, and require comparable types of accommodations and
27 assistance. Cowardin decl., ¶¶ 2-9. Besides these allegations
28 and evidence, a class consisting of prisoners with learning
disabilities has already been found in the Clark case to meet the
Rule 23 requirements. The Court therefore has an ample basis to
find that these requirements are met when the class is modified
to include the developmentally disabled.

One particular evidentiary concern raised by defendant is

1 that proof of the numerosity requirement of Rule 23(a)(1) has not
2 been provided. Yet this court already found that there were
3 adequate numbers of class members before adding in
4 developmentally disabled individuals. Order dated January 13,
5 1998. The Clark order further demonstrates that there are large
6 numbers of developmentally disabled inmates, who face the same
7 type of discrimination described in Dr. Cowardin's declaration
8 and alleged by Mr. Badillo and Mr. Simmons. As even further
9 proof that the numerosity requirement would be met by the sub-
10 class of developmentally disabled inmates alone, attached as
11 exhibit A is an excerpt from the declaration of Dr. Craig Haney
12 from the Clark case stating that there are currently between 3600
13 and 8300 developmentally disabled inmates in California prisons.
14 See Exh. A (Trial Decl. of Mark Haney dated June 7, 1998, pp. 20-
15 25.) As this class would also include future developmentally
16 disabled inmates, the numbers are even larger. The numerosity
17 requirement therefore has been met. See Fed. R. Civ. P. 23(a)(1).

18 Defendant also asserts that plaintiffs should have alleged
19 that the two proposed class representatives, Messrs. Badillo and
20 Simmons, were discriminated against due to a denial of counsel.
21 Plaintiff's Motion at p. 2-3. In fact, whether the appointment
22 of counsel is an adequate accommodation for each group of
23 disabled prisoners concerns the merits of this case, not the
24 class certification requirements. The appointment of counsel is
25 not the exclusive remedy sought by plaintiffs. For example,
26 counsel is of little use if the hearing room is not accessible,
27 or if the attorney is not capable of effectively communicating
28 with the deaf or developmentally disabled inmate. Plaintiffs

1 therefore have provided all the requisite allegations and
2 evidence required under Rule 23 for the requested modification.
3 See Fed. R. Civ. P. 23.

4 **III. CONCLUSION**

5 For all of the foregoing reasons, and for all the reasons
6 set forth in plaintiffs' Memorandums in Support of Motion to
7 Amend and Modify the Class, the Court should grant plaintiffs
8 leave to file the Second Amended Complaint and modify the class
9 to include developmentally disabled prisoners and parolees.

10 Dated: December 28, 1998

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12 Respectfully submitted,

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15 DONALD SPECTER
16 Attorney for Plaintiffs
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